Supreme Court, U.S.
FILED
MAR 15 1999
OFFICE OF THE CLERK

No. 98-1289

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

HISTORIC GREEN SPRINGS, INC.,
Petitioner,
v.
VIRGINIA VERMICULITE, LTD., ET AL.
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should this Court review a factbound application of the well-established antitrust doctrine excluding noncommercial restraints, which the Fourth Circuit expressly found consistent with all other circuit decisions interpreting this doctrine, correctly ruling that this doctrine was not satisfied on the highly unusual facts of this case where: (a) to evade an antitrust duty to deal, a monopolist made a donation coupled with anticompetitive restraints foreclosing a huge market share of an input vital to the monopolist's only rival, (b) the anticompetitive purpose was patent on the face of the donative restraints because they targeted anticompetitive concerns over preservationist ones, and (c) the donee knew its agreement was necessary to this anticompetitive objective and received a significant financial gain for agreeing to join the anticompetitive scheme?

2. Should this Court review a meritless claim -- which was never raised by petitioner below and never addressed by the Fourth Circuit or any other court -- that the application of federal antitrust law to the unusual commercial activity in this case is implicitly repealed by a federal tax provision governing completely different conduct?

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Respondent Virginia Vermiculite, Ltd., respectfully requests that this Court deny the petition for a writ of certiorari, which seeks review of the Fourth Circuit's decision holding that petitioner enjoys no immunity from antitrust suit on the particular facts of this case.

STATEMENT OF THE CASE

In a decision that not a single judge on the Fourth Circuit found merited en banc review, App. 16a, a unanimous Fourth Circuit panel correctly found that the well-established noncommercial exception to Sherman Act §1 was not satisfied on the highly unusual facts of this case. App. 9a-12a. Those facts merit restating because the petition misstates those facts, misleadingly obscures the anticompetitive scheme, falsely characterizes the holding below and claims it recognized a conflict with other circuits, and misleadingly implies petitioner raised an issue below that in fact it never raised till now.

1. The Highly Unusual Facts. There are only two domestic producers of processed vermiculite, which can be mined and processed in only two domestic locations: South Carolina and Virginia. App. 3a-4a. Because of the weight of raw vermiculite, it must be processed within a few miles of the mines. App. 22a; JA 571-72.[1] Grace is a vermiculite monopolist that mines and processes vermiculite only in South Carolina. App. 4a.

Although it never mined or processed vermiculite in Virginia, Grace bought up 80% of the vermiculite deposits in Virginia in the 1970s and proceeded to suppress their use for the next 20 years. *Id.* By the 1990s, Grace's only domestic rival -- Virginia Vermiculite -- was about to run out of its Virginia deposits and wanted to buy Grace's unused vermiculite deposits. *Id.*

The situation left Grace in something of a bind. If Grace sold Virginia Vermiculite the deposits, Virginia Vermiculite would stay in business and create real competition for Grace in the vermiculite market. But if Grace retained the deposits unused,

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[1] "JA" refers to the Joint Appendix before the Fourth Circuit. "App." refers to the appendix to the petition for certiorari.

Grace would presumptively have faced antitrust liability under the doctrine that a monopolist who refuses a rival access to a useful resource violates antitrust law if motivated by the refusal's exclusionary effect rather than legitimate business purposes.[2] Indeed, Grace would almost certainly have faced antitrust liability under the special doctrine prohibiting a monopolist from buying up and suppressing necessary inputs to keep them from its rivals.[3] Given that this antitrust doctrine applies even for duplicable inputs like plants, supplies, and personnel, then it certainly would have applied where (as here) the suppressed inputs are nonduplicable natural resources.

To evade its antitrust duty as a monopolist, Grace had to sell or transfer its deposits to someone else. But it knew that anyone else who had the deposits would have financial incentives to resell them for their most valued use: vermiculite mining. Grace then came up with the ingenious idea of making a strategic donation to continue Grace's suppression of these deposits. Pursuant to this anticompetitive scheme, Grace and petitioner agreed that Grace would donate all the deposits to petitioner.

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[2] *Aspen Skiing v. Aspen Highlands*, 472 U.S. 585 (1985); *Lorain Journal v. United States*, 342 U.S. 143, 155 (1951); *Eastman Kodak v. Image Tech.*, 504 U.S. 451, 483 n.32 (1992); App. 8a.

[3] *See United States v. American Tobacco*, 221 U.S. 106, 183 (1911) (monopolization proven by the "persistent expenditure of millions upon millions of dollars in buying out plants, not for the purpose of utilizing them, but in order to close them up and render them useless for the purposes of trade"); *American Tobacco v. United States*, 328 U.S. 781, 803-04 (1946) (defendants monopolized by buying unneeded tobacco to keep it from rivals); III AREEDA & TURNER, ANTITRUST LAW ¶604, at 8 (1978) ("buying rival plants in order to close them constitutes monopolizing behavior"); *id.* ¶731d, at 250 ("It would clearly be exclusionary for a monopolist . . . to acquire supplies obviously in excess of his needs"); *id.* ¶707c, at 110 ("Acquiring talent not to use it but to deny it to possible rivals is exclusionary"); *Universal Analytics v. MacNeal-Schwendler Corp.*, 914 F.2d 1256, 1258 (9th Cir. 1990) (same); *Midwest Radio v. Forum Publishing*, 942 F.2d 1294, 1297 (8th Cir. 1991) (same).

App. 4a-5a. But Grace did not trust petitioner not to resell or mine the property itself. Instead, as a condition of the transfer, Grace and petitioner agreed to restraints preventing vermiculite mining on the donated land. App. 5a.

Grace's purpose was thus anticompetitive, which was well-known by the petitioner. App. 4a-5a, 11a. Indeed, two other features emphasized that -- on its very face -- the patent purpose of this duty-evading donative restraint was anticompetitive, not preservationist. Grace and petitioner agreed to modify the original restraint -- which would have prohibited all mining -- to prohibit only vermiculite mining. App. 25a; JA 578-79. Since other mining poses an equal threat to preservation, the modification clearly indicated that petitioner wanted the freedom to deviate from the pure preservationist principles it here espouses, and that Grace did not really care about preservation as long as the mining that posed a competitive threat to it (vermiculite mining) was prohibited. Furthermore, apparently worried that post-mining reclamation might make vermiculite mining consistent with preservation, Grace and petitioner agreed that the prohibition on vermiculite mining applied even if reclamation eliminated preservationist objections by completely restoring the land to its prior state. App. 24a; JA 577.

In short, the restraints attached to the duty-evading donation were modified to prohibit vermiculite mining even when it does not cause preservation problems and to permit non-vermiculite mining even when it does. The anticompetitive purpose of the transaction was thus obvious on the face of the donative restraint.

Further, petitioner had a clear financial interest in this transaction. In return for agreeing to help Grace achieve its anticompetitive purpose, petitioner received nearly 1400 acres of land, much of which it re-sold for monetary gain. App. 4a-5a, 7a-8a, 11a. The agreement also furthered the financial interests of petitioner's management and members, who owned property whose value would have suffered if the agreement had not prevented hundreds of acres from being added to the local supply

of marketable property. App. 7a-8a, 11a; JA 575. Indeed, as the Fourth Circuit observed, the mere fact that the parties found it necessary to prohibit petitioner from engaging in vermiculite mining suggested petitioner had goals other than eliminating such mining. App. 8a.[4]

2. The Proceedings Below. The Fourth Circuit below correctly held that these facts alleged an agreement in restraint of trade, and that petitioner enjoyed no antitrust immunity under the doctrine excluding noncommercial restraints. App. 6a-12a. But petitioner is wrong to repeatedly -- and falsely -- assert that the Fourth Circuit acknowledged its decision conflicts with decisions from other circuits. Pet. 2, 7. The Fourth Circuit did no such thing. To the contrary, it explicitly considered these decisions from other circuits and concluded that its decision was fully consistent with them. App. 10a. The Fourth Circuit recognized that these other circuits were correct that the plain language of Sherman Act §1 does not cover "noncommercial behavior." *Id.* The Fourth Circuit simply made a fact-specific determination that the behavior in the case at hand was commercial, and thus not within the doctrine excluding restraints on noncommercial activity that the Fourth Circuit joined other circuits in recognizing. App. 10a-12a.

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[4]The Fourth Circuit decision reviewed a complaint dismissal and thus properly decided the case based on the facts alleged in that complaint. In contrast, the petition for certiorari improperly goes outside the appellate record to assert facts that are not contained in the complaint and that Virginia Vermiculite vigorously disputes. For example, the petition asserts that: (1) petitioner's motive was not financial but rather solely to preserve and protect the land; (2) petitioner's agreement prevented a form of strip-mining that would cause irreparable harm to preservationist values; and (3) the actual purpose for bringing this suit was to drive petitioner out of existence rather than to correct the anticompetitive harm. Pet. i, 2, 4, 18, 27. These unilaterally asserted facts are neither true nor part of the appellate record, and thus cannot form a basis for this Court's certiorari review.

Petitioner is also wrong to mischaracterize the Fourth Circuit as holding that a nonprofit's "mere" acceptance of a donation for noncommercial purposes is commercial conduct subject to antitrust scrutiny. Pet. 7-9. Instead, the Fourth Circuit decision emphasized that: (a) this was no "mere" donation but a donation that evaded a monopolist's antitrust duty to deal and was coupled with anticompetitive restraints foreclosing a huge market share to the monopolist's only rival; and (b) the transaction did not involve "mere" noncommercial purposes because the transaction had an anticompetitive purpose that the donee knew about and had a financial interest in furthering, given that the donee received significant financial gains for agreeing to help the monopolist further that anticompetitive purpose. App. 4a-5a, 8a, 11a-12a.

Petitioner also misleadingly implies that below it raised the issue of whether I.R.C. §170(h) precludes the application of federal antitrust law to its conduct. Pet. 19-20. In fact, petitioner never raised this issue below. Instead, the issue was raised below only in an amicus brief, and was thus properly never considered or discussed by the Fourth Circuit.

REASONS FOR DENYING THE WRIT

It is not surprising that no judge on the Fourth Circuit either dissented from this opinion or found it worthy of en banc review. This case involves the correct but factbound application of an undisputed legal standard to particular facts that are so unusual they are highly unlikely to recur.

There is even more reason why the petition for certiorari should be denied. U.S. SUPREME COURT RULE 10 counsels that normally certiorari is appropriate only when there is a legal conflict either between the lower appellate courts or between one such court and decisions of this Court. There is no such conflict in this case. On the noncommercial restraint issue, the Fourth Circuit decision instead correctly ruled that its decision was completely consistent with all rulings in other federal circuits.

App. 10a-12a. On the purported tax exception issue, petitioner does not even allege such a conflict, nor could it since no court (including the one below) has ever ruled on this issue.

This is simply not the sort of case that merits an allocation of the scarce resources this Court has to devote to reconciling conflicting lower court decisions. Even less can we say that the case presents issues that have percolated in the lower courts and reached a stage where the existence of multiple decisions and extensive legal analysis renders a conflict ripe for this Court's consideration. All the circuits recognize the doctrine excluding noncommercial restraints, but the Fourth Circuit is the only one to consider whether that doctrine applies to the unusual sorts of facts alleged here. And no circuit -- including the Fourth -- has ever rendered an opinion on the purported issue of whether I.R.C. §170(h) ever impliedly repeals some applications of federal antitrust law.

Even if this Court were in the business of deciding issues before any lower-court conflict had arisen, the issues here would not be appropriate for this Court's review. On the doctrine excluding noncommercial restraints, petitioner argues that a mere donation with purely noncommercial purposes should not be deemed commercial. Pet. 7-9. But this would be an extremely poor test case to develop this proposition for petitioner does not meet its own proposed standard. Rather, it is basically arguing that the Fourth Circuit was wrong to conclude that the transaction here involved neither a mere donation nor purely noncommercial purposes. "A petition for certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law" *See* U.S. SUPREME COURT RULE 10. On the alleged antitrust exemption created by I.R.C. §170(h), there was no discussion in the lower court at all because the issue was never raised by petitioner. The issue was thus not properly preserved on appeal, and in any event has not received the sort of briefing below that would make it appropriate for review by this Court.

Finally, even if the issues were appropriate for decision by this Court, petitioner is manifestly wrong on both issues. While donations to charities are normally noncommercial, the Fourth Circuit was clearly correct that this transaction differed from a normal donation in way that made it essentially commercial. Donations do not normally: evade a donor-monopolist's antitrust duty, come coupled with restraints that patently further not charitable goals but the anticompetitive goal of foreclosing a huge market share to rivals, and involve a financial payoff to the receiving charity for agreeing to join the anticompetitive scheme. This case appears to be the only one of its kind The decision below in no way threatens normal noncommercial donations that do not have these peculiar features.

The argument that a tax subsidy creates an antitrust exemption utterly fails to rebut this Court's heavy presumption against implicit antitrust exemptions. Indeed, it rests on the palpably false premise that, to get its tax deduction, Grace had to impose restrictions on the property it gave petitioner. In fact, the mere giving away of property to a charity is clearly sufficient to get a tax deduction, as anyone who has given property to a charity knows. The tax code cited by petitioner applies instead to the entirely different situation where the party seeking the tax deduction *keeps* the property, and donates away only a *partial* interest (like an easement) on that property. In such cases, the tax code quite sensibly requires some proof that the easement imposes a real restriction on the purported donor who retains the property. This provision does not apply where, as here, the donor gives away its entire interest in the property.

I. There Is No Conflict in Authority on the Noncommercial Restraint Doctrine. The circuits all agree that the Sherman Act excludes restraints on noncommercial activity. This case just involves the factbound question of whether this particular restraint fits within this doctrine. To avoid this problem, petitioner tries to frame the decision below as in

conflict with a purported doctrine that nonprofits acting with noncommercial purposes are immune from antitrust scrutiny for any restraint of trade coupled with a donation. Pet. 7-8. But no case has ever so held, and thus there is no conflict in authority on the issue petitioner raises. To the contrary, the cases uniformly hold that noncommercial restraint doctrine turns *not* on whether a party has nonprofit *status* or noncommercial *motives* but rather on whether the *activity restrained* is noncommercial. Nor does antitrust law confer any immunity on conspirators clever enough to attach the sheep's clothing of a donation to their wolfish anticompetitive restraints of trade.

The text of the Sherman Act contains no exemption for nonprofits, however noncommercial their motives or disinterested their incentives. Rather, Sherman Act § 1 states: "Every contract, combination . . . or conspiracy, in restraint of trade or commerce . . . is . . . illegal," and applies this prohibition to "[e]very person" entering such an agreement. Further, Sherman Act §8 defines "person" to include all "corporations" authorized by state law, which would include nonprofit corporations. Nor does the text provide any language excluding of restraints of trade that are attached to donations.

Accordingly, this Court has explicitly held that nonprofits are fully subject to the Sherman Act. *See NCAA v. Board of Regents*, 468 U.S. 85, 100 n.22 (1984); *American Soc'y v. Hydrolevel*, 456 U.S. 556, 576 (1982).[5] This Court has also

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[5] This conclusion is not only dictated by the statutory text but supported by sound policy. "Non-profit status affects the method of financing . . . and the form in which profits . . . are distributed . . . But no one has shown that it makes the enterprise unwilling to cooperate in reducing competition . . which nonprofit enterprises may dislike on ideological as well as selfish grounds." *Hospital Corp. v. FTC*, 807 F.2d 1381, 1390 (7th Cir. 1986) (Posner, J.). *Accord* AREEDA & HOVENKAMP, ANTITRUST LAW ¶232.2, at 354-60 (Supp. 1997) (same, adding that "[i]f the behavior is anticompetitive, the consequences are equally detrimental whether or not the actor" is a nonprofit).

repeatedly held that noncommercial motives do not save an otherwise illegal restraint -- even if the entity with the noncommercial motive is a nonprofit or any other public-spirited organization.[6] Indeed, this Court has held that nonprofits are liable for participating in a restraint of trade or commerce even when they receive no benefit (financial or otherwise) for participating in the restraint.[7]

The doctrine excluding noncommercial restraints does not deviate from the statutory text or these well-established precedents. Rather, as the Fourth Circuit correctly observed, it rests squarely on the statutory language that the "restraint" must be "of trade or commerce," and thus excludes cases only where the *activity restrained* is noncommercial, not where the *entity* that engages in the restraint (or its motive) is noncommercial. App. 10a. Petitioner falsely claims the circuits are in conflict, but in fact the Fourth Circuit is correct that all cases hew to this distinction between a noncommercial restraint and a

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[6] *See NCAA*, 468 U.S. at 101 n.23 (rejecting defense that nonprofit had social objective of preserving amateur sports because "good motives will not validate an otherwise anticompetitive practice"); *National Soc'y of Professional Engr's v. United States*, 435 U.S. 679, 681 (1978) (professional association liable for ethical canon even though its "purpose" was to protect "public safety"); *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 462-63 (1986) (professional association liable even though its purpose was a "legal, moral, and ethical policy of quality dental care"); *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 421-24, 427 & n.11 (1990) (professional association liable even though purpose was to vindicate Sixth Amendment rights because the Sherman Act provides no "immunity from prosecution on the basis of their good intent"). *See also United States v. Brown Univ.*, 5 F.3d 658, 666 n.7 (3d Cir. 1993) (nonprofit is not exempt for restraint on commerce even if nonprofit had a "beneficent objective").

[7] *Hydrolevel*, 456 U.S. at 560-62, 74 (holding nonprofit liable for issuing a letter that, without any benefit to the nonprofit, interpreted a safety standard in a way that restrained trade); *Allied Tube v. Indian Head*, 486 U.S. 492, 501 (1988) (stating antitrust rule of reason would apply to safety standard setting by financially disinterested nonprofit associations).

noncommercial entity/motive. App. 9a-10a. The cases deny immunity to nonprofits with noncommercial objectives whenever their restraint is on commercial activities. *See NCAA*, 468 U.S. at 92-93 (no immunity for nonprofit with noncommercial motive that restrained the sale of broadcast rights); *Hydrolevel*, 456 U.S. at 574, 576 (no immunity for nonprofit with noncommercial motive that restrained the sale of boilers); *Brown*, 5 F.3d at 666-68 (no immunity for nonprofit with noncommercial motive that restrained the sale of education). The cases grant noncommercial immunity to nonprofits only when their restraints are on noncommercial activities. In *Marjorie Webster Jr. College v. Middle States Ass'n*, 432 F.2d 650 (D.C. Cir. 1970), the restraint was on granting *free* accreditation to educational institutions. The absence of any charge for the accreditation meant it was a noncommercial activity, and thus that restraints on that activity were noncommercial. In *Dedication & Everlasting Love to Animals v. Humane Society*, 50 F.3d 710, 712 (9th Cir. 1995), the restraint was on soliciting donations. Because soliciting donations did not involve any sale of products or services, it too was not a commercial activity being restrained. Likewise, if two philanthropists agree to divide the "market" for giving charity to the homeless by each taking care of a different side of a city, App. 36a, the restraint would be on giving charity, which is a noncommercial activity. Indeed, far from supporting the proposition that noncommercial nonprofits enjoy any immunity to engage in activities that restrain commercial activities, these cases explicitly reject this proposition. *Dedication*, 50 F.3d at 713; *Marjorie Webster*, 432 F.2d at 654-55 & n.21.[8] In this

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[8]Though *Marjorie Webster* in dicta refers to whether the nonprofit had a "commercial motive," subsequent cases in that circuit repudiate any notion that a noncommercial motive affords any exemption to a nonprofit's restraint on a commercial activity. *See Ass'n for Intercoll. Ath. v. NCAA*, 735 F.2d 577, 583 & n.6 (D.C. Cir. 1984); *Costello Pub'g v. Rotelle*, 670 F.2d 1035,

case, although the transaction includes a donation, the alleged restraint of trade is not on the solicitation or giving of donations. Rather, the restraint is on a clearly commercial activity -- mining vermiculite -- and the anticompetitive effect on that commercial activity was patent on the face of the transfer documents.

If one follows the above precedent and thus properly puts aside petitioner's nonprofit status and allegedly noncommercial purposes, the only remaining factor that petitioner argues affirmatively justifies its assertion of immunity is that the transaction here was coupled to a donation. Pet. 7-10. But there is no authority supporting the proposition that any transaction involving a donation is noncommercial. Such an immunity would, contrary to law, preclude all antitrust review of Microsoft's coupling of Windows 95 and its Internet Explorer on the ground that the latter was "donated." *See* X AREEDA, ELHAUGE & HOVENKAMP, ANTITRUST LAW ¶1758, at 341 & n.2 (1995) (antitrust tying doctrine applies even if the tying or tied products are given free of charge). Indeed, the only circuit other than the Fourth Circuit to consider whether there should be an antitrust immunity for donations to nonprofits explicitly rejected that proposition. *See Ozee v. Amer. Council,* 110 F.3d 1082, 1093 (5th Cir. 1997). That case held that a donation to charity is a commercial transaction when the *donor* receives an "annuity, substantial tax advantage, and the satisfaction of having given to charity." *Id.* The Fourth Circuit decision below is clearly consistent with this ruling since here the donor (Grace) received the tax advantage and satisfaction as well as a suppression of competition far more valuable than any annuity. Moreover, creating a new judicial safe harbor for donations would be unwise since it would merely encourage parties to do what Grace did here, restructure its restraints of trade in the guise of a donation.

1056 (D.C. Cir. 1981); *see also Brown*, 5 F.3d at 667-68; *Hennessey v. NCAA*, 564 F.2d 1136, 1148-49 (5th Cir.1977).

Contrary to petitioner, *Dedication & Everlasting Love* does not support a doctrine providing antitrust immunity to all restraints of trade involving donations to a nonprofit. Pet. 9-10. It merely held that a restraint on the solicitation of donations was not covered because the *restrained* activity -- soliciting donations -- was not a commercial activity. 50 F.3d at 712. There was no claim in that case that the solicitations were restraining commercial activity, and the opinion nowhere held that a nonprofit would be immune if it obtained a donation under conditions that restrained some other commercial activity. There is thus no inter-Circuit conflict on this issue.

Petitioner also wrongly asserts that the Fourth Circuit's decision below conflicts with the Seventh Circuit's decision in *NOW v. Scheidler*, 968 F.2d 612 (7th Cir. 1992). Pet. 11-12, 15. But what that case held, relying on *Apex Hosiery v. Leader*, 310 U.S. 469, 482-501 (1940), was that conspiracies to trespass, seize, or vandalize property, or to harass, block, or injure persons, are not restraints of trade even though directed at a business and resulting in a reduction of its output. *See Scheidler*, 968 F.2d 612, 615-17, 622. This is clearly correct. A successful conspiracy to kill Bill Gates would no doubt reduce Microsoft's output, but would be a conspiracy to murder, not a conspiracy to restrain trade. But again the reason is that this sort of activity does not fit within the statutory language of Sherman Act §1, not that the actors are nonprofits with noncommercial purposes. Indeed, neither *Apex* nor *Scheidler* involved nonprofit defendants, and the *Apex* labor union was financially interested in making the employer accede to its demands. The activities were held not to be agreements in "restraint of trade" because they involved no agreement to restrict competition or production, or to withhold the marketing of goods or services. *Apex*, 310 U.S. at 494-95, 497 ("restraint of trade" must involve "some form of restraint upon commercial competition in the marketing of goods or services" or restrict "production"); *Scheidler*, 968 F.2d at 622 (defendants were engaging in "violent

'reprehensible' conduct," not "exercising market power").[9] Those cases have nothing to do with this case, which challenges not violent conduct but an agreement to transfer property on the condition that the recipient not deal with the transferor's rivals, which has the effect of directly restricting vermiculite production, evading a monopolist's antitrust duty to deal, and closely resembles tying and exclusive dealing agreements traditionally covered by antitrust law.

Consistent with the logic of the statutory language, *none* of the above decisions applying the noncommercial restraint doctrine has ever held that it renders only one of the co-conspirators immune from antitrust suit. Either the restraint is "of trade or commerce," and neither conspirator is immune; or the restraint is not "of trade or commerce," and neither conspirator is covered. Yet a mixed holding is precisely what petitioner seeks, for it does not deny that the statute covers Grace. Nor could it since Grace is a for-profit that was acting for totally commercial and anticompetitive purposes in restraining competition by its only rival. Petitioner instead seeks a holding that it is immune from suit even though its co-conspirator, Grace, is not. Pet. 6, App. 9a. Petitioner's position thus conflicts with the logic of the doctrine, which turns on the commercial nature of the restraint, not of the conspirators. Petitioner's position also conflicts, as the Fourth Circuit noted, with the well-established doctrine that an otherwise exempt actor loses its antitrust exemption if it conspires with a nonexempt party. *See Allen Bradley Co. v. Union*, 325 U.S. 797, 809-10 (1945); *United*

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[9] *Apex* also stated that, though its facts did not involve an agreement to withhold labor, *id.* at 504, such an agreement would not be a restraint of trade or commerce, but here it relied on Clayton Act §6, which explicitly defines "labor" as not being "commerce." *Id.* at 502-04. In contrast, an agreement not to buy a firm's products -- even though also involving a union pursuing the very same objectives -- *was* a restraint of trade or commerce. *Id.* at 505-07 ("the objective of the restraint . . . was . . . immaterial because . . . the restraint itself" was "offensive").

States v. Borden Co., 308 U.S. 188, 204-05 (1939); App. 11a. Finally, petitioner's notion that its different motive should save it from antitrust liability also conflicts with the well-established doctrine that knowing participation in an anticompetitive scheme suffices for liability even if one does not share the anticompetitive motive of the co-conspirator.[10] Petitioner offers no answer to these fatal defects in its legal theory.

In short, the decision below by the Fourth Circuit is completely consistent with all decisions involving nonprofits and the noncommercial restraint doctrine that have been rendered by this Court or other circuits, including the above decisions by the Third, Fifth, Seventh, Ninth and District of Columbia Circuits.

Finally, petitioner tries to manufacture a conflict with other decisions that did not concern the noncommercial restraint doctrine at all, but rather concerned the *Noerr* and First Amendment protections for political petitioning. For example, petitioner claims a conflict with the Eighth Circuit decision in *Missouri v. NOW*, 620 F.2d 1301 (8th Cir. 1980). Pet. 12. But that decision expressly relied not on the noncommercial nature of the restraint but on the fact that it involved political petitioning: "we do *not* rest our decision in this case upon the basis that the boycott was noncommercial and non-economic. Our decision is based upon the right to use political activities to petition the government . . ." 620 F.2d at 1315 n.16 (emphasis

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[10] *Hydrolevel*, 456 U.S. at 573-74 (holding nonprofit liable for participating in a restraint that financially benefits a co-conspirator even though the nonprofit neither engages in the restrained business nor financially benefits from the restraint); *United States v. Paramount*, 334 U.S. 131, 160-61 (1948) ("acquiescence in an illegal scheme is as much a violation of the Sherman Act as the creation and promotion of one"); *MCM Prtnr's v. Andrews-Bartlett*, 62 F.3d 967, 972-75 (7th Cir.1995) (collecting cases and finding liable a party coerced into exclusive dealing harming its financial interests); App. 11a. There is also the practical problem that petitioner now holds all the deposits. Thus, any remedy limited to Grace would leave in place the suppression of deposits that was Grace's anticompetitive goal.

added). That decision thus has nothing to do with this case, which does not involve political petitioning. Likewise, as the Fourth Circuit correctly concluded, this case has nothing to do with the First Amendment doctrine of *NAACP v. Claiborne Hardware*, 458 U.S. 996 (1982), both because petitioner identified no "speech" restricted by antitrust review here and because petitioner fails to meet that doctrine's requirement that it -- *and* all other co-conspirators -- be financially disinterested. App. 12a n.2 (citing *Trial Lawyers*, 493 U.S. at 525-28). The alleged conflict with these political petitioning and First Amendment cases is thus pretextual.[11]

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[11] The *Noerr* doctrine that antitrust does not cover genuine political petitioning even when it has an "incidental" effect on commerce is thus not implicated in this case. *See generally Eastern R.R. Pres. Conf. v. Noerr Motor Freight*, 365 U.S. 127, 142-44 (1961). Market activity, even if it mainly has a political impact, is not considered political petitioning, *Allied Tube v. Indian Head*, 486 U.S. 492, 502-04 (1988), and here the restraint was completely unrelated to any effort to secure political ends. Nor could the effect on commerce here fairly be said to be "incidental" because the agreement terms directly restrained private commerce and on their face were clearly designed to target that anticompetitive effect. The petition tries to create a legal conflict by characterizing the Fourth Circuit as holding that an incidental effect on commerce will (in and of itself) render any otherwise noncommercial restraint commercial. Pet. 11. In fact, the Fourth Circuit neither found the effect here "incidental," nor made any such holding about the implications of incidental effects. The Fourth Circuit merely held that -- under the entire complex of unusual facts here -- the restraint was commercial. Likewise, analogies to political boycotts like the old temperance society boycotts are inapt. Pet. 12. If anything, given Grace's role, the more accurate analogy would be to an agreement between a temperance society and a liquor dealer that the temperance society would, if paid off in land, boycott the liquor dealer's *rival*.

II. The Noncommercial Restraint Doctrine Was Correctly Applied to the Facts Here, Which Would Not Fit Even Petitioner's Proposed Standard and Are So Unusual They Are Unlikely to Recur. It would of course be wrong to conclude that every agreement to donate land to a nonprofit for noncommercial purposes was a commercial transaction covered by antitrust law. But the Fourth Circuit reached no such conclusion, and this is no such case. The very facts that explain why the Fourth Circuit's decision was correct also make clear why this situation was so unusual and unlikely to recur, and why it does not even fit the legal standard petitioner proposes.

The Fourth Circuit decision below relied on a combination of unusual factors in reaching its conclusion that the restraint here was commercial. It noted that the restraint foreclosed a significant market share of the supply of a commercial product. App. 11a. It reasoned that the donor was in the unusual position of using a donation to evade an antitrust duty to deal. App. 8a. It stressed that petitioner knew that it was joining a conspiracy to restrain trade that furthered the anticompetitive motives of its commercial co-conspirator. App. 11a-12a. And it observed that, by joining the conspiracy, petitioner received a large pecuniary gain and furthered the commercial interests of its management and members. App. 11a.

Thus, this was no ordinary donation. Donations are not ordinarily coupled with anticompetitive restraints that foreclose a huge market share to the monopolists' only rival. This one was. Donations are not ordinarily given to evade antitrust duties. This one involved a monopolist who bought up and suppressed resources necessary for competition for twenty years and then, to evade its antitrust duty to make those resources available to rivals, donated away the resources subject to that duty. Donations normally do not (and could not) further any anticompetitive purpose. Here the anticompetitive purpose of the donative restraint was well-known to the donee and patent on its face because it targeted competitors instead of preservationist

concerns. And while donees do normally benefit by the receipt of a donation, they do not normally agree to join an anticompetitive scheme in exchange for hundreds of acres of land, some of which they sell for profit and the rest of which they keep off the market to maintain the market price of property owned by their management and members.

If there are other donations that have been strategically designed to restrain trade, they must be rare and have certainly escaped our attention. This may well be the first strategic donation of its kind. Indeed, it is very difficult to even think of other hypotheticals where a firm could further its market position by giving away its productive resources.

First, to have such a hypothetical one must have a donation coupled with a condition that forecloses a significant market share of a commercial product. The number of a donations coupled with similar conditions is minor; the number that do so in a way that forecloses a significant market share is minuscule. For example, even a donation of all of Hilton Head with a condition prohibiting its use as a resort would not restrain trade because it would not foreclose any significant share of the market for resorts. Here, a huge 80% of the relevant market for deposits were foreclosed to a monopolist's only rival.[12]

Second, even in those cases where a firm does own land controlling a significant market share of a commercial product, it will rarely be the case that a firm can advance its market position and restrain trade by giving that land away with restrictive covenants. Normally, the best way for a firm to further its market position and lessen competition is to retain resources that confer a significant market share, not to give those

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[12]The market for vermiculite deposits in Virginia is the relevant market because that is the only market to which a rival with its processing plant in Virginia can turn given the high costs of transporting raw vermiculite. *See* App. 22a; JA 571-72. Moreover, even if the U.S. market were the relevant one, the restraints foreclosed 40% of U.S. vermiculite deposits. App. 4a.

resources away. What makes this case different (and unusual) is that here the controlling firm was a monopolist who had bought up and suppressed the resources for twenty years, had never used those resources or even built a processing plant in the same state to make mining possible, and was now under an antitrust duty to allow use by its rival unless it could somehow unload the property to someone else. Such cases must be exceedingly rare.

Third, here the strategic anticompetitive purpose of the donation was well-known to the preservationist group and patent on the face of the donation. Why else insert documentary provisions that prohibit vermiculite mining even when it does not cause preservation problems and permit non-vermiculite mining even when it does? *See* Statement of Facts. Few, if any, donations are on their face so blatant about targeting a monopolist's rival and prohibiting only dealings with that rival. Any donation with such an obvious anticompetitive purpose and effect clearly signals the recipient to decline it and its anticompetitive conditions. There is no risk that prohibiting such patently anticompetitive donative restraints would chill petitioner or other charities from accepting normal donations.

Moreover, even if petitioner were correct that a nonprofit should never be liable in antitrust for receiving a donation when its own purposes are purely noncommercial, this would be an extremely poor test case to develop that proposition. For petitioner does not meet its own proposed standard. Petitioner was not acting only or mainly to further noncommercial purposes -- petitioner had financially interests it was furthering. App. 11a. Namely, petitioner received hundreds of acres of land for joining an antitrust scheme that also furthered the financial interests of its members and management. *Id.*[13] Certiorari review should

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[13]Petitioner is correct that its financial interest should not determine whether the restraint is commercial, for any nonprofit soliciting a donation has a financial interest in getting that donation. Pet. 14, and the transaction here would be commercial even if petitioner were financially disinterested. But

hardly be granted to consider adopting a legal standard that the petitioner itself fails to satisfy.

In its own description of its pecuniary gain, Pet 17, petitioner omits the fact that it resold some of the donated land for monetary gain -- and remains free to sell the rest. App. 7a-8a, 11a. Petitioner knew that it would not get this land, and the financial proceeds that followed, unless it joined a conspiracy that it knew had an anticompetitive purpose and effect. Petitioner also omits mentioning that purely preservationist purposes cannot possibly explain the restraints actually agreed to -- both because those restraints would have been unnecessary if petitioner really would never allow vermiculite mining, App. 8a, and because the restraints were deliberately modified to prohibit vermiculite mining even when it does not cause preservation problems and permitted non-vermiculite mining even when it does cause preservation problems. *See* Statement of Facts.

Petitioner also suggests that the only financial benefit to its management and members was the attenuated benefit of deriving satisfaction from having the historic surroundings preserved. Pet 18. But maintaining property values by preventing nearby mining is not at all an attenuated financial benefit -- it is large and concrete. Moreover, the agreement here also directly suppressed an increase in the local supply of marketable land that otherwise would have lowered the market price of the land these

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petitioner is wrong to suggest the Fourth Circuit issued a ruling that a financial interest always makes a restraint commercial. The Fourth Circuit merely held that, on the entire complex of facts, the restraint here was commercial. Since petitioner below argued that it should be immune because it was financially disinterested, it made sense to respond in part with the observation that petitioner in fact had a strong financial interest. App. 11a. One need not believe a financial interest suffices to make a transaction commercial to believe that it is surely commercial to have such a financial interest in knowingly helping a monopolist evade an antitrust duty to deal and foreclose a huge market share to its only rival through restraints patently designed to target that rival rather than any charitable purpose.

management and members owned. This financial interest in protecting the market price of their land from increased competition is clearly not attenuated or noncommercial. Thus, even if petitioner itself did not benefit financially, these financial benefits to its management and members clearly suffice to hold petitioner liable for joining an anticompetitive conspiracy. *See Hydrolevel*, 456 U.S. at 573-74 (holding nonprofit liable even if its agents benefitted themselves rather than the nonprofit).

In short, each piece of property petitioner received for agreeing to join the anticompetitive scheme was either: (1) resold to the direct financial gain of petitioner or (2) kept off the market to maintain the market price of property owned by petitioner's management and members. The financial interest was plain.

These factors clearly suffice to make the challenged agreement commercial. They also suffice to distinguish petitioner's parade of horribles, for hardly any donations of preservation land to nonprofits will: (1) be coupled with conditions that foreclose a significant market share, (2) evade an monopolist-donor's antitrust duty to deal, (3) further a donor's commercial motive in restraining trade that is known to the nonprofit and blatant on the face of the donative restraint, and (4) be motivated by the financial gain the nonprofit and its management and members receives for joining in the anticompetitive scheme. Except for odd cases that replicate the unusual circumstances of this case, donations to preservationist groups and other charities will be completely unaffected by the decision below. When those unusual circumstances do exist, the donative restraint is properly deemed commercial and anticompetitive, and charities should know better than to join such patently anticompetitive schemes.

III. The Argument That I.R.C. §170(h) Creates an Implicit Exemption to the Antitrust Laws Was Not Preserved on Appeal and Involves No Conflict in Lower Court Authority. Before the Fourth Circuit, petitioner never raised the

purported issue of whether I.R.C. §170(h) precludes the application of federal antitrust law to its conduct. That purported issue was raised only in an amicus brief, and was thus quite properly never considered or discussed by the Fourth Circuit.[14] Having failed to properly preserve this issue on appeal, petitioner cannot now raise it for the first time in this Court.

Further, even if petitioner had preserved the issue, petitioner points to no conflict in judicial authority. Instead petitioner alleges a conflict between the decision below and a statute, I.R.C. §170(h). *See* Pet. 19 (claiming Fourth Circuit's interpretation of the Sherman Act conflicts with §170(h).) But this is not the sort of conflict approved as a ground for certiorari review under U.S. SUPREME COURT RULE 10, which cites only conflicts between judicial authority. And there is a very good reason why Rule 10 does not include conflicts between a decision and a statute. A claim of such conflicts is indistinguishable from a claim that a particular court misinterpreted the statute. If this Court were to become a court of errors in every case involving a statutory interpretation, its docket would quickly be swamped by such cases. Thus, as Rule 10 plainly provides, this Court sensibly prefers to wait until judicial authority conflicts on some federal question, including the federal question of how to interpret a federal statute.

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[14] *See, e.g., Bell v. Wolfish*, 441 U.S. 520, 531 n. 13 (1979) (court has no occasion to consider issue raised by amicus but not raised or preserved for appeal by party); *Knetsch v. United States*, 364 U.S. 361, 370 (1960) (same); *Preservation Coalition v. Pierce*, 667 F.2d 851, 861-62 (9th Cir.1982) (very same amicus as in this case tried to raise issue not raised by parties; held it cannot); *Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 705 n.22 (1st Cir.1994) ("In the court of appeals, amici cannot . . . introduce new issues or issues not properly preserved for appeal."); *Corrosion Proof Fittings v. EPA*, 947 F.2d 1201, 1208 (5th Cir.1991) (court cannot consider issues raised only by amici); *United States v. Northeastern Pharmaceutical*, 810 F.2d 726, 732 n.3 (8th Cir.1986) ("Syntex, as amicus, cannot raise issues not raised by the parties."); 3 C.J.S. AMICUS CURIAE §3, at 1052 ("a new question raised only in a brief filed by an amicus curiae . . . will not be considered.' ").

There is no such conflict in this case. Indeed, we are unable to find any published opinion that has ever considered the issue of a conflict between the Sherman Act and §170(h) at all -- probably because, as described next, the issue is entirely bogus.

IV. The Argument That I.R.C. §170(h) Creates an Implicit Exemption to the Antitrust Laws Relies on a Demonstrably False Premise About Tax Law, and Even If Accurate About Tax Law Would Fail to Rebut the Strong Presumption Against Implicit Antitrust Exemptions. Petitioner's purported conflict between the Sherman Act and the Tax Code is bogus because it relies on a demonstrably false premise about tax law. Petitioner's premise is that, absent the anticompetitive restraints Grace imposed on subsequent use of the commercial property it donated, Grace would not have received a tax deduction. Pet. 22. This premise is plainly false. If one gives a charity some property -- be that property money, a Monet painting, or a toxic waste dump that the charity resells -- that donation is deductible to the full market value of the donated property. *See* I.R.C. §170(a), (c); §26 C.F.R. 1.170A-1(c) (1999) (amount of contribution measured by property's market value). A donor need not impose any restriction at all on the charity's use of the donated property to get the deduction. Any restrictions are provided by the tax law defining a charity, which guarantees that any proceeds from market value bestowed on a charity will be used for charitable purposes

I.R.C. §170(h) deals with the entirely separate problem of taxpayers who try to get a deduction when they give away a *partial* property interest, like an easement on the property, and *retain* the rest of the property. In those situations, the Tax Code is quite sensibly worried about giving a tax deduction to a donor who may not have really given away anything of value. The Tax Code thus denies a charitable deduction in those cases, *see* I.R.C. §170(f)(3), unless the donation meets certain exceptions like the "qualified conservation contribution," which is later defined in

I.R.C. §170(h). The combination of §170(f)(3) and I.R.C. §170(h) assures that donors who give *partial* property interests for a purported conservation purpose get a charitable tax deduction only if they have imposed real restrictions on their use of the *retained* property interest. By its express terms, §170(f)(3) applies only to contributions that "consist of less than the taxpayer's entire interest in such property." Thus, donors who give away their *entire* interest in the property, as Grace did here, do not fall within §170(f)(3), and need never meet the requirements of I.R.C. §170(h).[15] In short, the tax benefits to Grace from its donation in no way hinged upon it imposing the anticompetitive restraints prohibiting vermiculite mining by its rivals.

In any event, favorable tax treatment hardly provides an exemption from antitrust law. Otherwise, firms could horizontally fix prices of capital assets in order to create the capital gains that tax law gives favorable treatment. A tax subsidy for a general class of activities has never been thought to implicitly repeal the application of antitrust law to particular forms of that activities that are anticompetitive.

After all, as this Court has stressed: "our cases have repeatedly established that there is a heavy presumption against implicit exemptions" to antitrust law. *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 787 (1975). As one scholar put it:

> The Supreme Court's rules for finding exemptions to antitrust policy testify to the dominance of Sherman Act policy: the Court disclaims its authority to create antitrust exemptions, *see* National Soc'y of Professional Engr's v. United States, 435 U.S. 679, 692 (1978), is reluctant to imply them, *see* National

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[15]It is irrelevant whether others have an interest in the same property. All that matters is that Grace gave away all of the interest *it* had in the property. That means its donation was not within §170(f)(3) and thus not need not comply with §170(h) to receive a tax deduction.

> Gerimedical Hosp. & Gerontology Center v. Blue Cross, 452 U.S. 378, 388-89 (1981); and construes express exemptions narrowly -- often remarkably so, *see, e.g.*, Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205 (1979).

Wiley, *A Capture Theory of Antitrust Federalism*, 99 HARV. L. REV. 713, 713 n.1 (1986).

Accordingly, an antitrust exemption can be "implied only if *necessary* to make the [non-antitrust statute] work, and even then only to the *minimum* extent necessary." *Silver v. NYSE*, 373 U.S. 341, 357 (1963) (emphasis added). That standard is clearly not met here. I.R.C. §170(h) has nothing to do with the conduct in this case. And even if it did, granting an antitrust exemption to the conduct here would in no sense be necessary to make the tax code work. For all the reasons stressed above, the conduct here is extremely unusual and in no way implicates normal donations or efforts to dedicate land for conservation. Providing antitrust immunity to such unusual -- and manifestly anticompetitive -- conduct is thus not at all necessary to the law providing favorable tax treatment for qualified conservation contributions, which normally do not implicate antitrust law at all. Indeed, there is no conflict even on the particular facts of this case since the anticompetitive restraints attached to the donation in question were entirely unnecessary to obtain the desired tax benefit.

This Court has repeatedly told parties that they must go to Congress, not the courts, if they want a special exemption from the Sherman Act. *Patrick v. Burget*, 486 U.S. 94, 105-06 (1988) (physicians must ask Congress for exception to further medical goals); *Professional Eng'rs*, 435 U.S. at 692, 695 (same for public safety goals). Judges have neither the authority nor any principled standards for undertaking the political task of balancing the benefits of competition against its harm to other social goals. If Congress wishes to prohibit vermiculite mining, or grant a special antitrust exemption to groups opposed to such mining, Congress may. But Congress has not done so, and thus

its antitrust statute must be given full effect to the anticompetitive conduct in this case.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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